

The struggle to minimise risk and harm for sex workers in New Zealand: The Prostitution Reform Act 2003

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Legislative approaches to the regulation of sex work in New Zealand have come under retrospective and contemporary scrutiny as researchers draw attention to the potential for the abuse of workers' rights.

This paper considers two legislative approaches, a “quasicriminalised” approach of “regulated tolerance”, and the recent decriminalisation of prostitution through the introduction of the Prostitution Reform Act (PRA) (2003). Drawing upon two empirical studies undertaken in Christchurch in 2003 and 2004, the paper explores how the institutional abuse of sex workers' rights continues within the context of decriminalisation.

The paper also discusses the tensions associated with implementing the principles of the Act by providing examples of the “manoeuvrings” of local authorities that have sought to both reclaim public spaces and secure the legal ambiguity of sex workers.

Violence is a complex and multifaceted issue and is generally considered in terms of the impact upon the health and well-being of individuals. Within the context of sex work, violence is commonly discussed in terms of the physical violence towards sex workers from clients, pimps and business operators, and of street workers who because of their visibility become the target of moral outrage and vigilantes. The murders of two Christchurch sex workers in recent years are the extreme end of a continuum of violence against sex workers. Institutional and organisational abuse through the disregard of sex workers' rights and promotion of punitive legislative controls have also been identified as having a cumulative effect upon sex workers' safety and welfare.

Prostitution, like gambling, is an area of activity that has not only persisted in the face of legal and moral condemnation but also expanded and become more visible. The regulation of this expansion has presented a number of dilemmas for state policy makers and law enforcement agents over the last two decades. Historically, prostitution has been viewed as morally suspect, deviant, and a threat to public order (Corbin, 1990; Fleming, 1988; MacDonald, 1986; Robinson, 1984; Sullivan, 1997). State policies described as “abolitionist” or “criminalisation” have rendered prostitution-related activities illegal in an attempt to address primary concerns about sexually transmitted “disease”, public order, and the protection of “decent” women (Corbin, 1990; Kehoe, 1988; Kilvington, Day, & Ward, 2001;

Levesque, 1986; MacDonald, 1986; Pheterson, 1989; Walkowitz, 1980). However, in practice, the selective interpretation and enforcement of legislation has variously sought to prohibit or impede prostitution and/or regulate the behaviour of prostitute women (Corbin, 1990; O'Neill, 1997; Pheterson, 1989; Roberts, 1993; Scutt, 1990; Smart, 1992; Summers, 1975). Certain sex markets, businesses and individuals have been permitted to operate (albeit discreetly) while others have been targeted for police action at particular times and locations (Neave, 1994). As a consequence, there is diversity within and across communities.

Prior to the passage of the Prostitution Reform Act in 2003, the New Zealand sex work industry operated under a form of “regulated tolerance”, an approach that relied upon ambiguous state legislation, local policing strategies or arrangements, and market self-regulation. Massage parlours and private escorts operated as quasi-legal sex businesses in particular locales. However, while legal ambiguity and policing strategies allowed businesses to flourish, sex workers remained vulnerable to organisational bullying and exploitation. Thus, a successful transition to a decriminalised sex work industry required such arrangements to be dismantled. Harm and risk minimisation became prioritised to promote the human rights, welfare, and occupational health and safety of sex workers.

Prostitutes' rights groups in particular, such as the New Zealand Prostitute's Collective, have been concerned with “identity politics” and the welfare of sex workers and their clients (Chetwynd, 1996; Eden, 1997), while neighbourhood, local business, or citizens' groups have mobilised to protect property values, and “quality of life”, addressing issues of public order and “nuisance” (Brock, 1998; Hubbard, 1998; Kilvington et al., 2001; Matthews, 1996; Skilbrei, 2001). Such developments have problematised prostitution by both reworking and informing the interrelated discourses of health professionals, municipal authorities, the judiciary, the police, community residential groups, sex workers' organisations, academics, and the media (Brock, 1998; Chetwynd, 1996; O'Neill, 1997; Plumridge & Chetwynd, 1996; Skilbrei, 2001; Sullivan, 1990; Ward & Day, 1997).

In response, state policies and policing procedures have tended towards an approach of toleration and containment of certain sex markets, both informally and formally (Benson & Matthews, 2000; Pérez-y-Pérez, 2003; Sharpe, 1998). For example, the Massage Parlours Act (1978) was introduced alongside existing legislation, the Crimes Act (s.147, 148a, 149, 1961), with the objective of market containment and surveillance; a pragmatic approach to policing sex markets

based upon police monitoring and surveillance, and state funding or support of the prostitutes' rights group (NZPC) (Chetwynd, 1996; Eden, 1997; Pérez-y-Pérez, 2003). In turn, as in other countries, the legitimisation of grassroots and prostitution groups led to calls by these groups for the revision of prostitution legislation (Bell, 1994; Chetwynd, 1996; Eden, 1997; English Collective of Prostitutes, 1997; Jennes, 1993; Neave, 1994; O'Connell Davidson, 1998; Pérez-y-Pérez, 2003).

New Zealand “regulated tolerance”: Registers, trust and co-operation

Over the last decade, the regulation of sex work in New Zealand can best be described in terms of “regulated tolerance” involving “self regulation, enforced if necessary through administrative rules, but always with the criminal law as a threat in the background” (Brants, 1998, p. 624). This pragmatic approach, premised upon ambiguous state legislation, has incorporated elements of criminalisation and containment, and relied upon a collection of informal arrangements or relations between sets of diverse actors with vested and/or competing interests (Eden, 1997; Pérez-y-Pérez, 2003; Robinson, 1987).

Prostitution legislation has addressed activities associated with prostitution rather than prostitution per se: to protect women from exploitation and to remove organised crime from prostitution (Eden, 1997; McLay, 1978; Robinson, 1987). Offences of prostitution-related activities included: soliciting (Summary Offences Act, 1981), brothel-keeping, and living on the earnings of prostitution procurement (Crimes Act, 1961). In particular, the Massage Parlours Act (1978) was an attempted organisational solution to meet the concerns of exploitation and organised crime and, more importantly, to facilitate increased surveillance of managers

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and owners, and sex workers, rather than to eradicate prostitution. Key to this approach was the location of massage parlours within a central commercial space, a licensing system for owners and managers of massage parlours, and a registration system for women working in these businesses. The registration of licencees worked as a tool of regulation to set up centrally located licensed premises which the police were able to access and monitor at will. In line with Hubbard's (1999) notion of "morality and spatiality", police actions against prostitution were shaped by an interpretation of where it actually occurred. Despite legislative definitions, there was considerable spatial variation of law enforcement, with police responses differing from city to city (Eden, 1997; Pérez-y-Pérez, 2003).

Massage parlours maintained order through boundary-defining activities such as personal and territorial agreements (Frey, Reichert, & Russell, 1981). This entailed establishing their own policies regarding sex work practice to ensure that they remained within the tacit arrangements for operation agreed with the police: acquiring a licence to operate and maintaining a register of masseuses, and refraining from allowing illegal (drug-related) activities to take place on the premises. Sex workers within these businesses were able to sell sexual services but unable to claim status as employees or as contractors. While such businesses operated quasi-legally, in terms of the law, sex workers occupied far more precarious positions. They were left vulnerable to the whims of policing agents and a system of organisational strategies, largely based upon the control or withholding of monies (fining and bonding sex workers), to extract commitment and work from the sex workers (Eden, 1997; Pérez-y-Pérez, 2003). Within this context, sex workers felt that they had very little legal recourse. The stigma surrounding prostitution also acted as a deterrent, preventing sex workers from bringing any experiences of exploitative conditions to the attention of the authorities.

Policing of private escort and street markets also hinged upon a system of surveillance based on the notion of self-regulation and trust relations. Private escorts operated from their own homes or rented properties, working on their own or as a small co-operative sharing the running costs and overheads. This work potentially offered women more autonomy over their work practice, as third-party management was not involved in the negotiation or exchange of monies. However, for regulation or containment purposes, the operational parameters of the escort market were not covered by legislation. Police were unaware of the number and identity of escorts who were or had been operating privately.

In terms of policing, bureaucratic surveillance becomes risk management of what can be defined as "suspect populations" (Ericson & Haggerty, 1997) and requires the collaboration of different

social sectors. In Christchurch, for example, a "voluntary" registration scheme for private escorts was introduced that paved the way for an informal system of market surveillance. Sex workers wanting to advertise in the local newspaper were required to be registered with the police. Although presented as a voluntary process, registration was a necessary process for survival in a market where most business relied on such advertising. Police toleration of the escort market hinged upon registration and for escorts to operate "discreetly".

Through such registration schemes, the police were able to access criminal records and police files of sex workers and their associates, where possible, to piece together networks of associations with other crimes or criminal activities which sex workers may be involved in, have knowledge of, or be associated with (Eden, 1997). Moreover, the private escort register enabled the police to map an invisible market. For sex workers, registration meant a partial loss of anonymity and the consequences of carrying the "prostitute" label indefinitely.

This informal registration of private escorts, also adopted in Wellington, has been cited as being invasive, treating sex workers more like criminals, exploiting the vulnerability of escorts in order for the police to achieve some semblance of containment and surveillance (Eden, 1997; Palmer & Reed 2001). The NZPC has described the escort register as essentially "locking" women into the industry, further arguing that the fear of disclosure to potential employers of their involvement in prostitution deterred some sex workers from actively seeking alternative employment.

The registration systems for massage parlours and private escorts were key to the toleration of sex markets and the basis for "trust" relations. In the sex work industry, such trust relationships do not rule out ambiguities, rather they exist because of them; characterised by uncertainty they also provide opportunities for exploiting the vulnerability of sex workers. As Eden (1997) points out, the legally ambiguous position of sex workers, particularly private escorts, provided the police with the potential for gaining information and mapping this particular sex market. Registration schemes thus proved a precarious option for sex workers in a context of criminalised legislation. Such systems of "quasicriminalisation" helped to perpetuate violence against prostitute women in that, for example, criminal law sanctions encouraged an adversarial relationship between sex workers and the police (Lowman, 2000). By treating sex workers as "outlaws" and denying them rights as workers, they become more vulnerable to abuse: exploitation, bullying, or violence in the workplace (Sanchez, 1998). For example, the assailable position of Christchurch sex workers to the whims of massage parlour management highlights the vulnerability of workers in the absence of real contracts or

employment relations, a position that is marked by ambiguity. One of the motivations for the introduction of the PRA was the removal of ambiguity for sex workers and the promotion of workers' rights.

The Prostitution Reform Act: Decriminalising sex work

The passage of the Prostitution Reform Act in 2003 effectively removed the offences of soliciting, brothel keeping, procurement of sex workers over the age of 18, and living on the earnings derived from prostitution, and repealed the Massage Parlours Act (1978). The momentum for the Reform Act came from the desire to minimise harm and risk for sex workers and "to reduce street prostitution by encouraging sex workers to operate in the safety and discretion of brothels rather than out in the public" (Bradford, 2005).

The Act, while not endorsing or morally sanctioning prostitution or its use, represents a significant attempt to safeguard the human rights and welfare of sex workers. The removal of the legal restrictions on commercial sex services also allowed other relevant legislation to be applied to the industry. Thus, overarching regulatory power of the sex work industry shifted from the police and was divided among a number of government and community groups. Legislation and codes of practice within various sectors ensure a continuance of market regulation by sex work businesses and personnel, and notably an increase in community (residential and local business) interest. A study undertaken in 2004 traces the shift from a criminal framework of containment or regulation and ambiguity for sex workers, to a work or employment framework of rights, and occupational health and safety, and notes a new set of tensions and uncertainty emerging for sex workers (Pérez-y-Pérez, in preparation).

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Police duties are now limited to ensuring that brothel operators have obtained an "operator's certificate", and to acting on information pertaining to the "employment of minors in brothels", or complaints by sex workers of exploitation or harassment by sex business management. Police no longer have the right to enter brothels without a search warrant. The redistribution of regulatory responsibility to other bodies other than the police has involved a realignment of networks and a transparency of alliances and arrangements that operated prior to the PRA.

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Making the transition: Arising tensions

The experiences of the Netherlands and New South Wales and Victoria in Australia indicate that law reform entails a highly complex process, requiring a renegotiation of relationships and alliances, and a reallocation of policing responsibilities that fall in line with the diversity of sex markets and community needs (Brewis & Linstead, 2000; Matthews, 2005; Outshoorn, 2001; Phoenix, 1999; Sullivan, 1997; West, 2000). The issue of (re)zoning sex markets or reordering of public spaces has become the new politics of sex work. City centres are contested sites - "purified spaces" - via the removal of visible vice from urban centres (Flusty 2001; Hubbard, 2004; Hubbard & Sanders 2003; Smith, 1996; West & Austrin, 2002). The marginalisation of sex work and sex workers geographically into "red-light" areas creates a "moral geography", implying that some behaviours are acceptable only in certain places (Hubbard & Sanders, 2003, p. 81). However, the process of (re)zoning sex markets and the creation of red-light spaces is one that involves conflicting ideas of the use of public or urban city spaces.

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In New Zealand, the inclusion of local authorities in the management of prostitution has seen the issue of visibility come to the fore. The PRA provides local authorities with powers to control the location of brothels and the signage of commercial sexual premises in relation to residential zones and distances from designated "sensitive areas", such as schools, pre-schools and children's playgrounds. Attempts by city councils to control the location of the sex industry have occurred in both Christchurch and Manukau.

The Christchurch City Council, for example, attempted to introduce the Christchurch City Brothels (Location and Signage) Bylaw prohibiting brothels, including small owner-operated brothels (SOOBs), from operating in residential zones. The Council drew up a boundary map to indicate potential workable spaces or commercial

operational areas within the central city. This placed some existing brothel businesses outside the boundary and effectively restricted SOOBs to one operator. Small owner-operated businesses, once an invisible sex market, were brought to public attention. The Council made it clear that it did not intend to tolerate the continuance of small brothels in residential areas (NZPC, personal communication, June 2004). Concerns centred on the risk of visible prostitution in residential areas: the impact upon property values, children, and possible development of large-scale brothels within the suburbs. However, removing sex workers' option to work in small groups from single premises, not only potentially placed them at risk, but diminished their rights. In a case that was heard in the High Court in June 2005, the presiding judge, Justice Panckhurst, declared that the Bylaw infringed upon sex workers in SOOBs' right to work. He also said that the Council had a responsibility to create policies that accommodated various sectors of the industry. The Bylaw was declared invalid in July 2005 ("Rules confining Chch brothels quashed", 2005).

The Manakau City Council, in another attempt to redefine the PRA, introduced a Bill (Control of Street Prostitution) to prohibit soliciting and associated conduct in public places. The Bill, representing increasing anxiety about urban crime and disorder, sought to re-criminalise street sex work within the geographical boundaries of the city; by making loitering an offence and imposing fines, the Bill would apply to both sex workers and their clients. Arguments against the Bill, which failed to pass the second hearing (in October 2006), indicated that the fear of prosecution could cause workers to move to other areas within or outside the city boundaries, essentially driving prostitution underground. This had the potential to increase the threat to the safety of sex workers in what is already a risky sex market. As research indicates, within criminalised street sex work, risks to the health and safety of sex workers are exacerbated through reduced access to peer, social and health support services (Kilvington et al., 2001; Mckeganey & Barnard, 1996; Sanders, 2005; Working Group on the Legal Regulation of the Purchase of Sexual Services, 2004; Soothill & Sanders, 2004). Further, fining street workers potentially creates a perverse incentive for workers to continue sex work in order to pay large fines (Day, 1996; Mckeganey & Barnard, 1996; Phoenix, 1999; Weitzer, 2000).

The actions of both the Christchurch and Manakau city councils went against the principles of the Prostitution Reform Act to safeguard the human rights of sex workers, to protect them from exploitation, and to promote their welfare, and occupational health and safety. Moreover, in their attempts to spatially reorganise sex

markets, both councils failed to recognise prostitution as legitimate work. Sex workers within such a discourse are depicted as part of a criminal class or a threat to societal values. Reducing the visibility of sex work can be seen in terms of strategies of "capital accumulation", encouraging urban gentrification as well as "social reproduction" by marginalising those who threaten the moral values that underpin a "decent society" (Hubbard, 2004).

Conclusion

The experience of the transition to decriminalisation of prostitution in New Zealand illustrates that the inclusion of a work approach to law reform can result in a new set of problems with regard to managing working conditions and the control of workplaces. When prostitution was illegal, the dominant social control agency was the police. However, when prostitution is decriminalised, issues of occupational health and safety are left to central and local government departments, community, health and prostitute groups (Zajdow, 1992).

In situations where the sex work industry is highly developed and differentiated, as is the case in New Zealand, there are conflicting pressures for both greater control and greater liberalisation. In this instance, a multi-agency approach to the regulation of sex markets is often adopted with legislation setting the framework to work within (Hubbard, 1999; Marchand, Reid, & Berents, 1998; West, 2000). Prior to the Prostitution Reform Act (2003), the practical and effective regulation of prostitution presented a number of dilemmas for state policy makers and the police. Punitive legislative controls largely failed to take into account the diversity of sex markets or the innovative organisational strategies of individual sex workers and businesses (Pérez-y-Pérez, 2003). Regulatory approaches, such as those aimed at solicitation, brothel-keeping and procurement, were largely informed by moral discourse and relied upon conventional police surveillance, alongside informal local arrangements. Moreover, "regulated tolerance" of sex markets favouring sex businesses and securing the non-status of sex workers, alongside the continued marginalisation and stigmatisation of sex workers, are the main obstacles to creating safer working environments (Lowman, 2000).

The passage of the Prostitution Reform Act in 2003 required a redefinition of regulating prostitution, one that would fit within a work or employment and rights framework. The reconfiguration of regulatory responsibility brought together a number of diverse groups. Although a multi-agency approach can be beneficial for sex workers and businesses, it can also highlight struggles and competing interests particularly where the interests and agendas of prostitutes' collectives contrast with more ideologically credible community groups representing neighbourhood interests and local councils and, more importantly, with sex workers' rights (Pérez-y-Pérez, 2003; West, 2000). The attempted redefinition of the Reform Act demonstrates the potential for institutional abuse of workers' rights, highlighting bureaucratic tensions of law reform, involving diverse views and

competing interests that often result in impractical measures to regulate public space and increase the occupational risks of sex work.

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